

LEA ITAX SIG, European Conference Rome

Obstacle Runs: permanent establishment?

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Client situation (i)

Multiple “obstacle runs” per year in (2023):

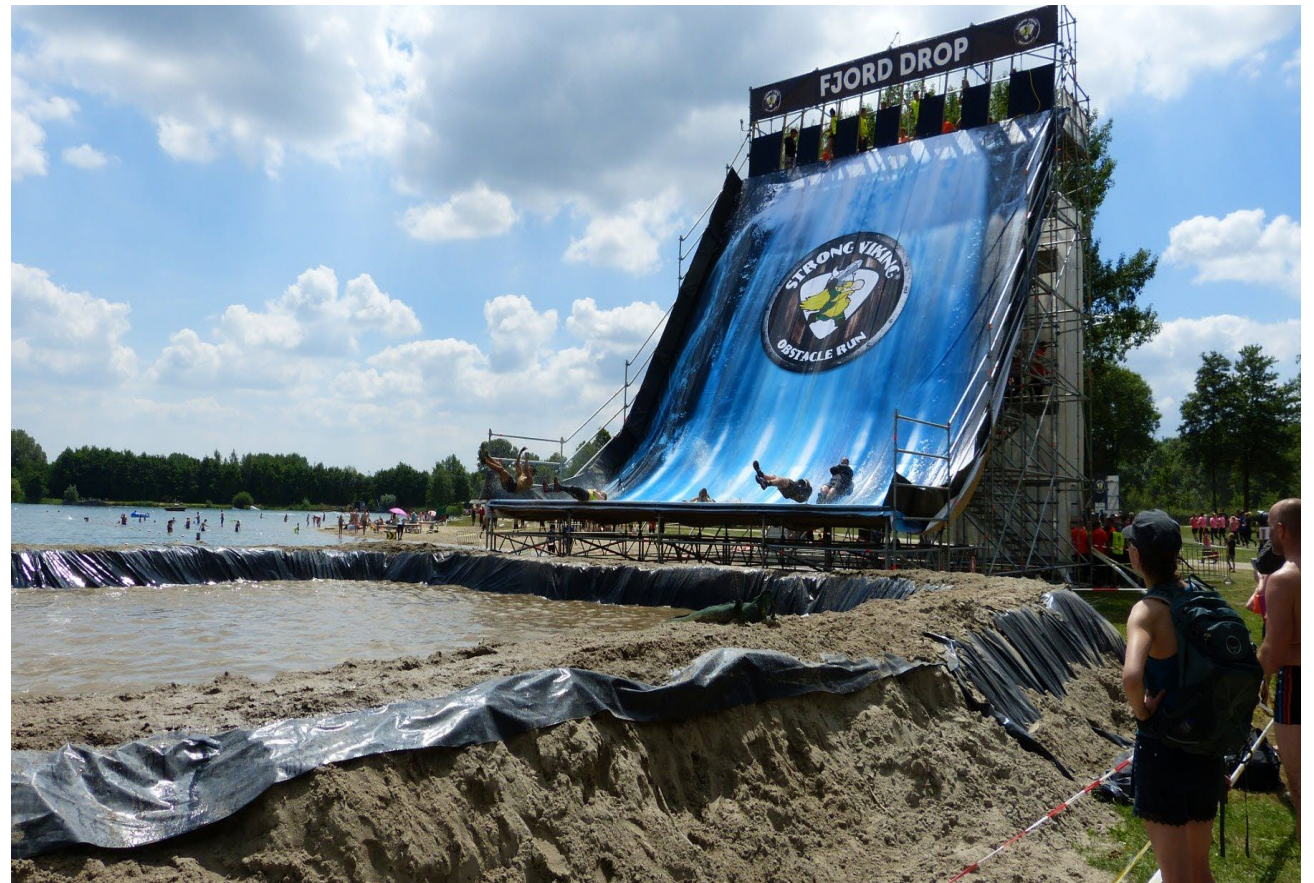
- Germany: Frankfurt, Berlin & Warstein
- Belgium: Gent & Balen
- Netherlands: Amsterdam & Wijchen

Different editions:

- Water
- Mud
- Family
- Brother
- Trail Run
- Ultra Viking

Everything is being managed out of NL:

- Ultimate shareholder lives in NL
- One employee lives in Germany but works out of the Dutch office
- All equipment and obstacles are stored in NL



Client situation (ii)

- License required from German municipality.
- Intention to organize runs for consecutive years, but license needs to be agreed on every single year.
- Several trucks transport the materials needed to build the obstacles from the Dutch storage location to the location of the event.
Handful of employees together with local short-term hires build up the obstacles (appr. 7-10 days).
- Typically, the runs are organized in a city for three days straight two times per year.

**Does this create a PE?
(based on the OECD Comm. 2017)**





Article 5(1) OECD Model: Basic rule PE

*“a fixed place of business through which
the business is carried out”*

Cumulative tests:

1. Place of business

This covers any premises, facilities or installations used for carrying on the business (for example an advertising pillar)



2. Right to use the place of business



3. Right of use must be maintained with a certain degree of “permanence” (**duration test**)

*A stand at an **annual Christmas market** for three weeks per year should not constitute a PE (Finanzgericht Köln 2002),
but a sales wagon’s use of a **marketplace twice a week** for a year does (BFH 1974 Weekly Market)*

4. The place of business must be located at a “distinct geographical place” (**location test**)

1 and 4 are so closely related that it will suffice in many cases to discuss them as one condition.



A. Duration?

- **Starting point:** “there is no safe harbor” (no minimum duration)
- Many countries apply **6 months**
 - < 6 months normally not enough; and
 - > 18 months always enough
- Dutch Supreme Court in **“Circus tent” (1954)**: “5 to 6 months”
- The time required will depend on which country the business activity is performed.

Recurrent business activities (i)



Recurrent (seasonal) activities: assessed on an aggregated level?

OECD Comm. 2017 art. 5 no. 29

- Contract for drilling in Labrador for 3 months each summer for 5 years?
 - duration test is met in the first year.
- Contract is split into several contracts, e.g., one contract for each year?
 - These contracts should be identified as one, provided they represent a “commercially coherent whole”.
- Drilling company concludes contracts with ≥ 2 unrelated oil companies?
 - Each project separately

(no commercially coherent whole and the location test should also not be met)

OECD Comm. 2017 art. 5 no. 22.

Recurrent business activities (ii)



- Same principles apply to traditional businesses of seasonal nature e.g., forest clearings, circus, carnival and fairs performing a certain business activity every year at the same place for a certain period.

The time may be added and constitute a PE at the point in time when the required duration is reached.

- The special rule for recurrent activities applies only if the breaks in the business activity are caused by **“the nature of the business operations at that location”**.

A ski instructor’s business activities can only be performed during the winter season: several seasons may constitute a PE if they are added.



B. Location test: base approach

Starting point: separate “places” may only create a PE on a stand-alone basis.
PE conditions must be met for each place separately.

This “base approach” was established early in the Prussian Supreme Administrative Court’s practice;

- **Chimney Sweep (1907):** the activity of a chimney sweep in the houses he visited a few times a year did not meet the “location test”, although he conducted his activity continuously within a delimited area of the town. **Lack of “*Mittelpunkt*”**
The conclusion would probably be the same under the OECD 2017 model treaty;
- **Taxicab Driver (1963):** German Supreme Court confirmed the position of the Prussian Court that a taxicab driver did not have a PE if he regularly performed his work in the streets of Hamburg.

German tax authorities have reconsidered their position on these issues.

According to the Ministry of Finance (1987), a movable place of business may constitute a PE if it has a temporary fixed location.

The German policy changes were leading forward the changes in the OECD Comm. in 2002.



Location test: spatial delimitation approach (i)

Court cases of the last decades (and confirmed in the OECD Comm. 2003) show a shift from the “base approach” to the “spatial delimitation approach” (“continues presence test”):
a place of business can be located within a certain area.

Today a moveable activity within a delimited area meets the “location test” under the basic rule even if the activity has only a short-term physical location, provided:

- It is regularly repeated at the same spot or conducted within a geographically coherent area; and
- The business is commercially integrated as one project performed for one client.

This development was inspired by the solution, which had been used for construction projects over several years:

- the construction of a railroad, a pipeline or a row of houses, has for decades been considered “one place”;
- The conditions for a PE, in particular the 12-month test, are considered for each project or for several projects combined if they can be identified as one project.



Location test: spatial delimitation approach (ii)

- The spatial delimitation approach is not applicable to unlimited movements within a huge area:

Norwegian Supreme Court in **“Alaska”** (1984): The fishing boat used by three Norwegian fishermen during the fishing season within the ocean outside Alaska, was **not** a *fixed* place of business.

- Clarification is needed on how far the acceptance of this approach has gone.

Concert Tour: German musical group had concluded a 14-month contract with a US manager. The performances were held at different places in the US and included performances in Canada.

➤ No PE was found because the performances were not located at one place.

The actual duration of the stay in the US is thus immaterial. **(consistent with OECD Comm. 2017, art. 5 no. 21)**

Same outcome for circuses, ice shows etc.

Timber 1982 & 1990 (mutual agreements between Norway and Germany): Norwegian enterprises performing work in a German forest had a PE in Germany when the work lasted for six months.

These cases led to the current OECD Comm. The forests are likely to be considered a geographical coherent whole, and the business of the enterprises was commercially coherent (OECD Comm. 2017 art. 5 no 22).

Location test: geographically coherent whole



Issue under the post-2003 OECD Comm.:

is the taxpayer conducting a commercially coherent business (a single project for one client) through a place of business which constitutes a geographically coherent whole i.e., a contingent area controlled by one party to which the taxpayer has a business relation.

OECD Comm. 2017 art. 5 nos. 21, 22, 51 and 57.

General rule geographically coherent whole

A geographically coherent whole is a contingent area, which is disposed over by the taxpayer's client (and therefore, also disposed over, for PE purposes, by the taxpayer).

Among the places disposed over by the taxpayer or the client and other places disposed by the same persons, there cannot be any area, which is not disposed over by those persons (**"no islands"**).

Consequently, a city cannot be one geographically coherent whole for the purpose of the "location test".

A geographically coherent whole does not have any specific minimum or maximum size.



Ambulant (mobile) places of business

Drilling of exploration and test wells is normally conducted over a large area, within sectors of fields (“blocks”) licensed by the government of the coastal state. Drilling in the seabed is normally performed at one point for a few weeks. The question is whether drilling at different sites within one block or several blocks meets the location test.

Borgny Dolphin (UK 1984):

- Norwegian semi-submersible drilling rig
- Vessel operated mainly on UK continental shelf during 1975-1977 for 4 unrelated oil companies
- These assignments were not consecutive; interruptions lasted 1-3 months (docking and other assignments)
- Rig was docked in Norway twice during the working period (8 months during 1975-1976)
- Vessel was also engaged for 1.5 months on the Irish continental shelf in 1976

UK commissioners concluded: **no PE**

Tenor of the case: drilling activities for different, unrelated clients, when interrupted by other assignments, do not meet the “location test” under the basic rule. See also **Gurtler (1980)**.

The area where the assignments took place were neither geographically nor commercially coherent.

It is not likely today that the conclusion under the OECD Comm. 2017 should be different.



Consultant example

- A consultant works for a bank pursuant to a single project for training of the employees.
The consultant works at different locations within the HQ of the bank, or within the facilities of one branch.
 - Geographical coherent whole
Same applies if he works for two or more parties owning or controlling the building together.
 - Commercial coherent whole
Carried on as a single project for one client
- The consultant is training the employees at different branches, within the same city or across the country.
 - No geographical coherent whole according to the OECD Comm.
The branches are “islands” and between each “islands” there are areas, which are not at the disposal of the taxpayer’s client



Office hotel example

- Consulting firm regularly rents offices in the same hotel, although in different parts of the hotel, from which its consulting business in this area is conducted.
 - Geographical coherent whole
It is not important that the firm is using different floors and rooms in the hotel as long as the firm is using a single hotel unit operated by one counterparty.
- What if the consulting firm is using a hotel consisting of two or more buildings on different sides of the road connected with bridges or tunnels and the hotel is operated by the same enterprise?
 - Same outcome: geographical coherent whole
- What if the taxpayer switches to separately located hotels from time to time that belong to the same hotel chain?
 - No geographical coherence can be established
The taxpayer would be using the “islands”



Painter example



- A painter, who is working within one building owner or controlled by one party?
 - Geographical coherent whole
Same applies if he works for two or more parties owning or controlling the building together.
 - If the painter is working on one project for one client: commercially coherent whole
 - If two or more unrelated contracts for two or more unrelated clients: no commercial coherence
OECD Comm. 2017 art. 5 no. 24
- Two owners of the building, and each owns a separate part of the building (e.g., each owns one floor)
 - The area owned or controlled by each party will constitute one geographical coherent whole



Recent case law (i)

- **Telecommunication**

German taxpayers conducted business in Luxembourg for several years. They connected new cables from the houses with the public network (spread all over Luxembourg).

The taxpayers and their 14 employees traveled to Luxembourg on Monday and returned on Friday.

- BFH Urteil of 19 November 2003:

A large number of building sites spread over Luxembourg were not considered a geographically coherent whole

- **MVF Lootus Osahuing**

Estonian company was engaged in fishing outside Spain in 2000-2001.

MVF owned a fishing vessel with freezing and factory capacities. The fish were cleaned, gutted, filleted, cut into pieces and frozen onboard the vessel. This was all done in international waters.

The fish was brought into a Spanish harbor.

- Audianca Nacional 25 April 2013: no geographical coherence
(there was commercial coherence)



Recent case law (ii)

- **Tourist**

UK enterprise operates tourist yachts in Turkish territorial waters. The customers stayed for several nights in the yachts during the sea excursion. The starting and ending point was a specific harbor in Turkey and the tour comprised various bays of the Turkish coastal area. A permission from the authorities was required.

- Turkish Supreme Administrative Court (*Danistay*), 5 October 2010:
Yachts owned and used within Turkish territorial waters and marketed to foreigners, constituted a PE in Turkey under Turkish domestic laws and this was compatible with the tax treaty Turkey – UK.

This conclusion seems to be consistent with the OECD Comm.; the yachts were operating within a geographically coherent area, in accordance with the permission by the government (and the business was a commercially coherent whole)



Limits in the size of “one place”?

Offshore oil & gas

- Shelf states license “blocks” to oil companies, by which the companies obtain an exclusive right to explore for oil & gas within that block (and extract the resources if anything is found).
- Each block may cover large areas in the ocean, and the exploration activities may take place all over the block.
- Often the oil company has a license to explore several blocks, either neighbor blocks or separated blocks.

For example: offshore seismic activities

- A seismic vessel is sailing back and forth across the block a number of times for several weeks “shooting” seismic and collecting data from the seabed.
- The data are sold or licensed to an oil company.

Can the block be considered to one geographical coherent whole for the seismic company?

- Based on the OECD Comm., the best reasons support that the block is geographically coherent.
- The whole block is at the taxpayer’s disposal. If 2 blocks are contingent, they should also be considered one “place”.
- Separated blocks, however, cannot be considered a geographically coherent whole (**no “islands”!**)

Conclusion: no minimum or maximum size of the area (the location) is required



Recent publication knowledge group ITAX of Dutch tax authorities (location test)



Facts: A foreign company has been assigned > 20 locations in and around a Dutch city where it is allowed to park “vehicles” [scooters, bikes, steps?] that can be taken there by users, for a fee, and returned to a location after use.

Question: Is there a PE in the Netherlands?

Answer knowledge group (2022): Yes

Consideration: OECD Comm. 2017 art. 5 no. 10:

*“a place of business may also exist where no premises are available or required for carrying on the business of the enterprise and **it simply has a certain amount of space at its disposal (...)**”*

There is no support in the OECD Commentary for the position that an entire city can be seen as one fixed location.
OECD Comm. 2017 art. 5 no 25:

“Conversely, an area where activities are carried on as part of a single project which constitutes a coherent commercial whole may lack the necessary geographic coherence to be considered as a single place of business (...)”

The various locations form an equal number of PE’s. The results are aggregated in one corporate tax return.



Obstacle Runs: aggregation different cities?



- ❖ Should the days in different German (3) and Belgium (2) be aggregated for the duration test?
 - Strong arguments for no aggregation:
 - No geographical coherent whole (“Islands”)
 - Concert Tour (German musical group)
 - Licenses with unrelated municipalities and runs aimed at different target groups (families, friends, race, extreme etc.)
 - Publication knowledge group Dutch tax office: 20 different “places” in one city
 - Borgny Dolphin (UK 1984): interruptions, no geographic / commercial coherence



Obstacle Runs: aggregation multiple years?



❖ Aggregation multiple years?

➤ In my view aggregation should in principle not apply, but ...

- Not a multi-year contract, but the intention is to have a multi-year cooperation (no legal obligation)
- Christmas market (Finanzgericht Köln 2002 & München 1993)
- Runs are organized basically throughout the whole year (last event is 9 December 2023, with only a short break in the new year). The special rule for recurrent activities only applies if the breaks in business activity are caused by “the nature of the business operations at that location”
- **German “reservation”** to sentence 2 of par. 28, par. 29 & par. 30 of art. 5 of the 2017 OECD Comm.:
the necessary degree of permanence requires a certain minimum period of presence during the year concerned, irrespective of the recurrent or other nature of an activity.

Questions?



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